

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 10Jul2002



In the matter of
Wilner Mascary
Claimant

v.

Cases No. 2001 LHC 1293

Labor Ready
Employer

and

United Self Insured Services
Carrier

and

Director, Office of Workers'
Compensation Programs
Party in Interest

DECISION AND ORDER

APPROVING STIPULATION

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901, et seq., (the "Act"), and the regulations promulgated thereunder. The Claimant is represented by Barry R. Lerner, Esquire, of Dania Beach, Florida and the Employer/Carrier is represented by John J. Rabalais, Esquire, of Covington, Louisiana. On June 10, 2002, counsel for the Employer/Carrier advised that the case had been resolved to which the parties would be submitting a Petition under Section 8(i) of the Act for approval of settlement. On July 2, 2002, Mr. Rabalais submitted the following:

1. Application for Approval of Agreed Settlement;
2. Proposed Order;
3. Petition for Attorney's Fees; and
4. Itemization of Hours and Costs prepared by Claimant's Counsel.

The parties have stipulated to the following:

1. The Employee/Claimant, Wilner Mascary, was born on June 12, 1953 and is currently 49 years of age.
2. On or about December 4, 1999, the Claimant was employed as a temporary general laborer by the Employer at Port Everglades. While assisting with the unloading of containers from the barge, the Claimant alleges that he slipped on an oily substance on a container causing him to fall, landing on his back. The Employer has disputed the occurrence of the accident and the compensability of the claim as a result of medical which implies that the Claimant injured himself while working on the roof of a trailer on the same date as the alleged accident.

As a result of the alleged accident, the Claimant alleges to have problems with his back, neck, right knee and right hip.

3. The Employer is primarily self-insured for any and all liability for the payment of Longshore and Harbor Workers' Compensation benefits, with liability in excess of a specified amount insured by Reliance National Indemnity Company, which is now insolvent and in the process of liquidation. As a result of the large self insured retention limit, it has not been necessary for the Louisiana Insurance Guaranty Association/Federal Insurance Guaranty Association to make any payment in connection with the Employees' accident and resulting injuries.
4. Description of Medical Care (See Composite EXHIBIT "A" for all pertinent medical reports/documents): Claimant initially sought treatment for his alleged injuries at Workers' Compensation Medical Center (Palmetto General Hospital) on December 6, 1999, two (2) days following the alleged incident. While there, Claimant was diagnosed with cervical and lumbosacral sprain to which nine (9) days of physical therapy were prescribed. X-rays of his lateral lumbar spine were taken and were read as negative. However, x-rays of the lateral cervical spine revealed narrowing at L5-6 and moderate degenerative changes at C4-C6. The Claimant received work restrictions which included no lifting, pushing, or pulling anything greater than ten (10) pounds and to avoid bending, prolonged standing/walking and alternate sitting/standing. The doctor indicated that the Claimant was able to work with these restrictions.

On December 8, 1999, Claimant sought follow-up treatment with Dr. Joseph Dieuvil at Palmetto General. At that time, Claimant reported feeling slightly better. Dr. Dieuvil noted tenderness and decreased range of motion of the right lower extremity. The diagnosis at that time was right hip strain, lumbosacral and cervical sprain. The restrictions remained the same and continued physical therapy was prescribed.

On December 15, 1999, Claimant again sought treatment with Dr. Dieuvil to which it was reported that he was feeling better. Dr. Dieuvil again noted tenderness in Claimant's cervical region and poor mobility, while the restrictions remained the same. However, the diagnosis was changed to cervical and lumbosacral strain.

After completing his sixth physical therapy session, Claimant again underwent treatment with Dr. Dieuvil on December 22, 1999. In addition to feeling much better, Dr. Dieuvil noted that Claimant's upper and lower extremities were within normal limits. Restrictions remained the same and so did Dr. Dieuvil's diagnosis.

On December 30, 1999, Claimant sought treatment with Dr. Dieuvil because of back pain. Dr. Dieuvil noted muscle guarding and severe restriction in forward bending. Claimant reported that his knee was a little better and his neck felt much better. Claimant's restrictions remained the same and the diagnosis was the same, with an inclusion of a knee sprain.

Dr. Dieuvil treated Claimant on January 6, 2000 as a result of continuing pain in his neck and knee. However, Claimant reported that his neck felt better. Claimant's physical therapist recommended ceasing therapy. Dr. Dieuvil diagnosed Claimant as having a lumbosacral strain and ordered an MRI of his lumbar spine. The restrictions remained the same.

On January 31, 2000, Claimant sought treatment with Dr. Dieuvil wherein the MRI results were discussed. Claimant complained of continued back pain. The MRI

revealed no bulging disc and no herniation. Claimant's work restrictions remained the same. Claimant sought a second orthopedic opinion on February 3, 2000 with Dr. Verano Hermida.

Claimant complained of pain in his low back and knees. Dr. Hermida diagnosed Claimant with a mild cervical sprain/strain and a lumbosacral sprain/strain, along with symptomatic arthropathy and bilateral patellofemoral pain syndrome. Claimant was given Cortisone and Marcaine injections and it was recommended that he treat with Dr. Fox for lumbosacral facet blocks and to continue physical therapy. Light duty work status was also recommended.

On February 24, 2000, Dr. Hermida again treated Claimant as a result of complaints of back and knee pain. Claimant, however, did indicate that his neck pain had resolved. Additionally, Dr. Hermida indicated that, if no further medical treatment was rendered, Claimant was at maximum medical improvement with impairment ratings of 3% lumbar spine; 1% bilateral knees and 5% whole body based upon Florida Impairment Guidelines. Light duty job status was still recommended. Claimant sought treatment with Dr. Brad Chayet on March 2, 2001. Claimant presented complaints of neck, bilateral knee and lower back pain which is most significant. Dr. Chayet reported no radiation, weakness or numbness. Dr. Chayet's impression was chronic myofascial neck and low back pain; chronic bilateral knee pain (right worse than left), possibly patellofemoral. Dr. Chayet recommended a pain center evaluation with Dr. Fox for possible injections and returned the Claimant back to work, modifying his duties to limited bending, stooping and avoid prolonged standing and walking. Lastly, Dr. Chayet advised that a functional capacity evaluation might be necessary.

On March 30, 2001, Claimant sought follow-up treatment with Dr. Chayet after his authorization for epidural blocks was denied. Dr. Chayet's impression was the same. Dr. Chayet again recommended that Claimant pursue injections at the pain center and advised him to remain on modified duty work status.

5. At the time of the work accident, the Claimant was employed as a temporary laborer for the Employer, working on a part-time basis at or near minimum wage depending upon the work required of the Employer's customers. Prior to the date of the accident, the Claimant was earning, on average, approximately \$396.00 per week while employed as an electrician's helper by a non-maritime employer. The Claimant continued to work full time in such capacity until March, 2000. The Claimant was offered and accepted light duty from the Employer at the same time he was working full duty as an electrician's helper. Claimant was eventually terminated by the Employer due to his failure to perform the light duty work requested by the Employer. Since the Employee's claims were disputed for the reasons set herein and due to the fact that the Claimant became employed elsewhere, the Employee was not paid weekly compensation for all periods of alleged disability.

6. The Employer, the Carrier and the Third-Party Administrator contend that the

Claimant/Employee is not entitled to any benefits as he did not sustain a compensable accident and injury under the Act. Further, the Employer and the Carrier contend that even if he, the Employee, did sustain a compensable accident and injury, he is not entitled to any additional indemnity nor medical as his claims

are false since he was able to work in a full time heavy manual labor position from the date of accident through March, 2000 while at the same time representing that he could not perform the light duty work made available by the Employer with no post-accident loss of wage earning capacity. The Employee contends that he did sustain a compensable accident and injury and, as such, is entitled to additional medical treatment in the form of pain management as recommended by Dr. Chayet, along with any prescription medication recommended by said physician. Claimant further contends that he was disabled since March, 2000 and is entitled to past and present indemnity.

7. Claimant and his counsel represent that he is not eligible for, nor has he applied for Medicare, nor has he in the past received or is currently receiving SSDI or Medicare benefits. Claimant and his counsel acknowledge and represent that Medicare has made no payments prior to the date of this settlement agreement. Claimant and his counsel do hereby expressly waive and decline to allocate part or all of the settlement proceeds being paid herein by the Employer and the Carrier to a Medicare Set Aside Trust pursuant to 42 U.S.C. § 1385, and, as such, the Claimant acknowledges and understands that he shall have no past, present or future entitlement to Medicare benefits for medical expenses related to the alleged work accident and/or injury in hereby expressly waiving the establishment of a Medicare Set Aside Trust. Claimant and his counsel do further hereby agree to defend, indemnify and hold harmless the Employer and the Carrier in regard to any and all claims, demands, suits and proceedings claimed, threatened, made, file or instituted by Medicare or any other affiliated, related or similar governmental agencies or entities.

8. The parties do not wish to pursue this matter to a formal hearing, have agreed to compromise their differences and settle this claim for a lump sum of fifty thousand dollars (\$50,000.00). The parties submit that the settlement is adequate in that the only future exposure for the Employer and the Carrier is that of the expense of a functional capacity evaluation and in the cost of minimal future over the counter medication for the Employee in the event of occasional discomfort.
9. Approval and payment of this agreed settlement will discharge the Employer, Carrier and Administrator of any and all liability for the payment of any compensation, indemnity and medical, past, present and future, as a result of the Claimant's alleged December 4, 1999 injury.
10. The settlement proceeds in the amount of fifty thousand dollars (\$50,000.00) are to be distributed as follows:
- | | |
|---|---------------------|
| • Payment to Claimant for Compensation/Medical: | \$ 35,000.00 |
| • Representative Fee | <u>\$ 15,000.00</u> |
| Total Settlement: | \$ 50,000.00 |

11. The Claimant attests that his settlement has not been procured by duress.
12. Receipt and Release: For and in consideration of the payment of FIFTY THOUSAND AND 00/100 DOLLARS (\$50,000.00), the receipt and sufficiency of which is hereby acknowledged, the undersigned, Wilner Mascary, does hereby grant full release, discharge and acquittance unto the Employer, Labor Ready, Inc., its workers' compensation carrier, Reliance National Indemnity Company and/or The Louisiana Insurance Guaranty Association/Federal Insurance Guaranty Association,

and its Third-Party Administrator, Risk Management Services, L.L.C., all of their agents, servants, employees, officers and directors and successors and assigns from any and all liability whatsoever arising out of an alleged accident on or about December 4, 1999, when Wilner Mascary allegedly injured his back, neck, right knee and right hip, as a result of his employment with Labor Ready, Inc.

It is the intent and purpose hereof that the Claimant grant to the above designated parties a full and complete release from any and all liability whatsoever, whether related to his work accident of December 4, 1999, or otherwise, including, but not limited to, any and all claims for workers' compensation payments and medical expenses under the Louisiana Workers' Compensation Act, the Longshore and Harbor Workers Compensation Act, wrongful termination, unemployment compensation, constructive discharge, violations of all state and federal laws, claims in tort, violations of Americans with Disabilities Act, vocational rehabilitation, mileage reimbursement, pain and suffering, mental anguish, loss of earnings and earning capacity, whether past, present or future, whether known or unknown, and any and all other liability whatsoever arising out of the aforesaid alleged accident while in the employ of Labor Ready, Inc. It is intended by the parties that this release serve as a full and final release of any and all claims of whatever kind or nature, that the parties may have against the other for any reason whatsoever.

It is the further intent and purpose hereof that the Claimant grant to the above designated parties a full and complete release from any and all liability whatsoever arising out of any injuries or claims he may have as a result of his employment with Labor Ready, Inc. under the laws of the State of Louisiana, of the United States of America, or any claims he might have against, the Employer, the Carrier and/or the Third-Party Administrator as a result of his employment with Labor Ready, Inc.

It is the further intent and purpose hereof that the Claimant agrees to protect, defend and

indemnify Labor Ready, Inc., the Carrier and the Third-Party Administrator, from any and all claims of any nature or kind whatsoever as a result of his alleged work related accident of December 4, 1999, or any other work related accidents that he sustained as a result of his employment with Labor Ready, Inc.

In further consideration and as part and parcel of this settlement, the Claimant does hereby voluntarily resign from his employment with Labor Ready, Inc. and does further hereby release Labor Ready, Inc. from any and all liability, of any nature or kind whatsoever, arising out of his employment with Labor Ready, Inc. including, without limitation, any and all claims Wilner Mascary may have under federal and state labor or employment laws under federal and state tort laws.

In support of the fee request, counsel for Claimant advises that he has been practicing law for over eighteen (18) years and he specializes in cases involving Workers' Compensation, Labor Law, *Jones Act* and cases arising under the Longshore and Harbor Workers' Compensation Act. An itemized statement of the extent and character of the necessary legal services performed was submitted. Claimant's counsel has expended a total of 58.80 hours on this case.

I have reviewed the claim file, the documents presented and the stipulations submitted. I note that the

attorneys fee is reasonable and necessary for the services performed. As this is a stipulation before the Office of Administrative Law Judges, approval by the District Director is unnecessary. Upon careful review of the documents provided, I accept the stipulation and make the following findings and conclusions:

FINDINGS OF FACT And CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are made:

1. The agreed settlement is adequate and not procured by duress;
2. Settlement in the amounts set forth in the Stipulation is hereby approved and the Parties are directed to carry out the requirements of the settlement;
3. The liability of the Employer, Carrier and Third-Party Administrator for all payments of benefits, past, present and future, including without limitation, compensation and medical benefits, under the Longshore and Harbor Workers' Compensation Act, resulting from the Employee's alleged accident and injuries of December 4, 1999, while employed with Labor Ready, Inc., will be discharged upon payment of the agreed upon sum;
4. All benefit payments will cease upon the approval of this 8(i) Stipulation; and
5. The Employer, Carrier and Third-Party Administrator shall pay fifteen thousand dollars (15,000.00) as an attorney's fee and costs to Barry R. Lerner, Esquire, for services rendered on behalf of the Claimant; such fees shall be paid to said attorney and shall be paid in addition to the compensation payable to the Claimant.

Now, therefore, under 33 U.S.C. Section 908(i), the settlement is approved, and the terms of settlement are **ACCEPTED** upon the Findings and Conclusions set forth above.

SO ORDERED

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Daniel F. Solomon
Administrative Law Judge